No. 80204-1

SUPREME COURT OF THE STATE OF WASHINGTON

ARTHUR T. LANE, KENNETH GOROHOFF and WALTER L. WILLIAMS, individually and on behalf of the class of all persons similarly situated,
Respondents/Cross-Appellants,

v.

THE CITY OF SEATTLE,
Respondent/Cross-Respondent,

v.

THE CITY OF SHORELINE, KING COUNTY, KING COUNTY FIRE DISTRICT NO. 2, KING COUNTY FIRE DISTRICT NO. 4 (a.k.a. Shoreline Fire Department), NORTH HIGHLINE FIRE DISTRICT NO. 11, KING COUNTY FIRE DISTRICT NO. 16 (a.k.a. Northshore Fire Department), and KING COUNTY FIRE DISTRICT NO. 20,
Respondents, and

THE CITY OF BURIEN and THE CITY OF LAKE FOREST PARK,
Appellants.

RATEPAYERS' ANSWER TO AMICUS BRIEF OF WASHINGTON STATE FIRE COMMISSIONERS ASSOCIATION

David F. Jurca, WSBA #2015
Jennifer S. Divine, WSBA #22770
Connie K. Haslam, WSBA #18053
HELSELL FETTERMAN LLP
1001 Fourth Avenue, Suite 4200
Seattle, Washington 98154
(206) 292-1144
Attorneys for Ratepayers Lane, *et al.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

The amicus brief of the Washington Fire Commissioners Association[1] adds nothing of value to the briefing already before the Court. It largely rehashes certain arguments fully addressed in the parties' prior briefing, and the only new arguments it offers are based on erroneous interpretations of court decisions on issues not involved in this case.

We begin by making three preliminary observations, and then address each of the four substantive arguments made in the Fire Commissioners' amicus brief.

First, as we noted at the outset of our opening brief (at 1, 17-18) and reply brief on cross-appeal (at 1-8), the part of the judgment requiring Seattle to make refunds for pre-2005 fire hydrant costs is not at issue on this appeal. Seattle is the only party aggrieved by that part of the judgment, and it has not appealed from that or any other part of the judgment. Nor has Seattle assigned error to any trial court ruling. Thus, Seattle is bound by the part of the judgment requiring it to make refunds for pre-2005 fire hydrant costs, and the Fire Commissioners' arguments cannot be deemed a basis for modifying that part of the judgment.

---

[1] The amicus is "an association of fire protection districts." Amicus Br. at 1. As such, its purpose is presumably to advance the interests of the five Fire Districts that are already parties to this lawsuit and have already submitted their own brief on appeal. To distinguish the amicus from the Fire Districts that are parties, we shall refer to the amicus as the "Fire Commissioners" or "the Commissioners."

Second, there is no evidence before the Court supporting the Fire Commissioners' statement that "the currently accepted practice" is to charge utility ratepayers for fire hydrant costs through general water rates. (Amicus Br. at 2). Not only did Seattle abandon that practice more than three years ago,[2] but there is no evidence at all in the record about how fire hydrants in other jurisdictions are currently being paid for. Even if it were true that "the currently accepted practice" is to charge utility ratepayers for fire hydrant costs, that would not make it legal.

Third, in arguing that fire hydrant costs should not be imposed on fire districts, the Fire Commissioners are arguing against a position that was not adopted by the trial court and is not being advanced by any of the parties actively participating in this appeal. The trial court ruled that the general governments of Seattle and the suburban cities, not the fire districts, are responsible for the costs of fire hydrants within those jurisdictions.[3] The only party still appealing from that ruling is Lake Forest Park. Nowhere in its opening brief or reply brief does Lake Forest Park argue that fire districts are responsible for the costs of fire hydrants.

---

[2] Seattle continues to charge ratepayers for fire hydrant costs, but since January 1, 2005 it has been doing so through an increase in the water utility tax rather than through water rates.

[3] In the case of Shoreline and the parts of King County served by SPU, however, the trial court ruled that SPU had agreed by written contract to indemnify the city and the county against those costs. Hence, the trial court held that SPU was entitled to reimbursement from Burien and Lake Forest Park but not from Shoreline or King County.

It argues only that utility ratepayers or Seattle's general fund (see LFP Reply Br. at 8: "If anyone's general fund should be charged it should be Seattle's") should bear those costs.[4]

Likewise, neither Seattle nor any of the other respondents have argued in this appeal that fire hydrant costs should be imposed on the fire districts. The ratepayers, while cross-appealing from other aspects of the trial court judgment, have not taken any position on whether such costs should be borne by the suburban cities or the fire districts. The ratepayers' position is simply that fire protection, including fire hydrant service, is a governmental function rather than a proprietary utility function, and therefore the costs of that service cannot properly be imposed on utility ratepayers through water rates. Thus, since neither the trial court nor anyone actively involved in the appeal has suggested that fire districts should bear the costs of fire hydrants, the Fire Commissioners are in effect arguing against an empty chair in asserting that such costs should not be imposed on fire districts.

---

[4] Burien, the only other party who appealed from the trial court judgment on Seattle's third-party claims against the suburban entities, did argue, in the alternative, that if ratepayers are not responsible for fire hydrant costs then those costs should be borne by the fire districts rather than the suburban cities. However, Burien has filed a motion to withdraw its appeal. As of this writing, the Court has not ruled upon the motion, but we do not anticipate that there will be any opposition to the motion or any reason not to grant it. There is nothing in Lake Forest Park's opening or reply briefs that incorporates any part of Burien's argument that fire districts should be held liable for fire hydrant costs.

The Fire Commissioners begin the Argument section of their amicus brief with an argument that is premised on its own conclusion. The Commissioners assert that only the ratepayers receive a "direct benefit" from fire hydrants, and therefore they should pay for them. (Amicus Br. at 2). But that premise is flawed. It is the general public that receives the benefit of fire hydrants, and therefore it is the general government that should pay for them. When a city's police department apprehends a burglar, it is the general public that benefits, not just the homeowner whose house was robbed, and therefore it is appropriate for the general government to pay for the costs of the police department. The situation is no different with respect to the public safety service of fire protection, including fire hydrants.

This is merely another way of stating the universally recognized principle that public fire protection is a general governmental function. (*See* Ratepayers' Opening Br. at 19-20). Since fire hydrant costs are just one important element of the overall cost of public fire protection, it is appropriate for the general government to pay for them.

We turn now to the four separately numbered arguments made in the amicus brief.

II. ARGUMENT

A. To the Extent It Could Arguably Be Construed to Authorize General Governmental Costs to Be Included in Utility Rates, the Statutory Language upon Which the Fire Commissioners Rely Has Already Been Held Unconstitutional by this Court in the Analogous Context of Streetlights.

The Fire Commissioners' first argument is that in RCW 35.92.010, 57.08.005(3) and 54.16.030, the legislature has authorized cities and towns, water districts and public utility districts, respectively, to provide an "ample supply" of water "for all purposes" and to "control the price" thereof. From that general statutory language, the Fire Commissioners apparently extrapolate that the "price" charged to ratepayers can include the costs of providing water not only for the ratepayers' own use but also for general governmental or other purposes.

The first problem with the Fire Commissioners' argument is that the general statutory language simply does not reach the question they are trying to address. The statutory language may authorize cities and districts to provide an ample supply of water and to charge for it, but it does not say who can be charged for it. For example, the general statutory language may say that a publicly owned water utility is authorized to provide water for use in public parks, but it says nothing about whether utility ratepayers can be charged for the costs of providing water for that kind of public purpose. To answer that question one must look to other

legal principles.

The statutory framework described by the Fire Commissioners was exactly the situation confronting Seattle with respect to both streetlights and fire hydrants prior to 2002. RCW 35.92.010 and .050 contained general language authorizing cities to provide water systems (.010) and lighting systems (.050) but did not specify who was to be charged for the costs of fire hydrants included within municipal water systems or for the costs of streetlights included within municipal lighting systems. In an effort to obtain statutory authority to charge those costs to utility ratepayers, Seattle sponsored and narrowly obtained passage of legislation in 2002 to amend both sections to explicitly include fire hydrants and streetlights "as an integral utility service incorporated within general rates." Laws of 2002, Chapter 102.

However, that strategy turned out to be unsuccessful for Seattle. This Court held unanimously in *Okeson v. City of Seattle*, 150 Wn.2d 540, 78 P.3d 1279 (2003) ("*Okeson I*"), that including streetlights within the language of RCW 35.92.050 did not magically transform street lighting from a governmental function into a proprietary utility function, and that charging ratepayers for the general governmental function of providing streetlights still constituted an unconstitutional "hidden" tax despite the 2002 amendment. *Okeson I*, 150 Wn.2d at 557-58; *see* Ratepayers'

Opening Br. at 28-29.

Exactly the same reasoning applies to the inclusion of fire hydrants within the language of RCW 35.92.010. Public fire protection is still a general governmental function, and charging ratepayers for that general governmental function still constitutes an unconstitutional hidden tax despite the 2002 amendment explicitly adding "fire hydrants" to the statute. Since the explicit language added by the 2002 amendment was insufficient to allow Seattle to charge general governmental costs to utility ratepayers, the vague pre-2002 language about providing an "ample" water supply, upon which the Fire Commissioners rely, cannot be sufficient to legitimize including such costs in water rates.

The Fire Commissioners' citation of *Twitchell v. City of Spokane*, 55 Wash. 86, 104 P. 150 (1909), which held that water is a commodity that a municipal utility can charge its customers for, also does not add anything to the analysis. Of course ratepayers can be charged for the water service they use. The question under discussion, however, is whether ratepayers can be charged for water service used by the city for governmental purposes. For nearly a century it has been the law of this state that:

> The city, in meeting functions that are called governmental, is taking from the city as a proprietor a thing held in its proprietary capacity; therefore the general fund of the city may be charged, and the special fund credited, with a reasonable charge for the water used, when it is so provided

> in the ordinance. The city, as a governmental entity, stands in the same relation to the system as a private citizen who is patronizing it.

Uhler v. City of Olympia, 87 Wash. 1, 14, 151 P. 117 (1915) (emphasis added). That is why, under the Local Government Accounting Statute (RCW 43.09.210), the city's general government must be treated like any other utility customer and must pay the utility for costs of water service used by the parks department, or in municipal buildings, or for other general governmental purposes such as public fire protection – including fire hydrants.

B. The Prior Line of Cases Cited by the Fire Commissioners Are About Connection Charges, Not Water Usage Rates, and Do Not Support the Fire Commissioners' Position.

The Fire Commissioners' second argument is that the statute authorizing the inclusion of fire hydrant costs in general utility rates (the Commissioners must be referring to the 2002 amendment to RCW 35.92.010 discussed in the preceding section of this brief) must be presumed to be constitutional, and that "the constitutional presumption is where the judicial inquiry should begin and end." (Amicus Br. at 5). The Commissioners do not explain why two centuries of constitutional jurisprudence following *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803), should be so deftly swept aside, particularly where this Court has already declared unanimously in *Okeson I* that the same 2002

amendment did not cure the constitutional defect in the directly analogous situation of streetlight costs.

The Commissioners accuse the ratepayers of ignoring prior case law "that specifically addresses the validity of water rates that include fire hydrant costs." (Amicus Br. at 7). The reason the ratepayers (and the other parties in this case) have "ignored" those cases is that they are completely irrelevant. They do not address water rates at all. They also do not address the critical issue of whether fire hydrants serve a governmental function or a proprietary function, or whether the costs of a governmental function may be charged to utility ratepayers through rates. The three cases cited by the Fire Commissioners all involve one-time connection fees imposed on real estate developers, not usage charges paid by utility customers through rates. As this Court and Division III of the Court of Appeals pointed out in the cited cases, that distinction is important.

In the first of the three cases, *Hillis Homes, Inc. v. PUD No.1 of Snohomish County*, 105 Wn.2d 288, 714 P.2d 1163 (1986), this Court affirmed, on direct review, a trial court decision upholding the validity of connection fees imposed by a PUD on a real estate developer for the privilege of connecting new homes to the PUD's water system. The trial court found that the connection fees were based on the new customers'

proportionate share of the costs of capital improvements to the water system necessitated by the new connections, and that the charges "pay for only those improvements to the water system necessitated by the new customers, and hence will benefit them alone." 105 Wn.2d at 300 (emphasis added). There was no discussion at all in the Court's opinion about fire hydrant costs or who should pay for them, or whether fire protection served a governmental or a proprietary purpose, or whether fire hydrant costs could lawfully be included in the rates to be paid by utility customers for water usage.

The second of the three cases cited by the Fire Commissioners is *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 980 P.2d 1234 (1999). The principal questions addressed in that case were (1) whether a city was required to deduct grants and donations in calculating a new owner's "equitable share" of the costs of constructing a water system, and (2) whether the city acted arbitrarily and capriciously in charging different connection fees to two allegedly similarly situated developers. A divided Court held that the statute (RCW 35.92.025) authorizing a connection fee based on the new owner's "equitable share" of construction costs did not require a deduction for grants or donations, and that there was a rational basis for charging a higher fee to a later developer. As in *Hillis Homes*, there was no discussion at all in the opinion about fire hydrant costs or

who should pay for them, or whether fire protection served a governmental or a proprietary purpose, or whether fire hydrant costs could lawfully be included in the rates to be paid by utility customers for water usage.

In fact, the Court explicitly pointed out that one-time *connection charges* require a different analysis than ongoing *rates* for water usage:

> The trial court made several "findings" that the costs of providing water was the same for both developers. Findings relating to the cost of providing services, while possibly relevant to determining *rates,* are irrelevant for computing RCW 35.92.025 *connection fees*.

138 Wn.2d at 575 n.3 (italics in original). The Court went on to reject the developer's claim that the city violated the rate statute (RCW 35.92.010) mandating that users within the same class be charged the same rate:

> RCW 35.92.010 is a statute concerning the adoption of long term, ongoing water *rates*. Here we are confronted with the methodology for calculating one time municipal water connection fees or charges.

Id. at 575.

The third of the trio of cases cited by the Fire Commissioners is *Irvin Water Dist. No. 6 v. Jackson P'ship*, 109 Wn. App. 113, 34 P.3d 840 (2001). In that case the primary question before the court of appeals was whether a water district was required to charge theconnection fee that was in place at the time the developer initially requested water service for use during construction, or whether the district could charge a higher connection fee that had been adopted by the time the developer formally

applied for connection to the water system. Again, as in *Hillis Homes* and *Landmark Development*, there was no discussion in the opinion about fire hydrant costs or who should pay for them, or whether fire protection served a governmental or a proprietary purpose, or whether fire hydrant costs could lawfully be included in the rates to be paid by utility customers for water usage.

It is misleading for the Fire Commissioners to characterize any of these cases as approving "water charges" (Amicus Br. at 10) that include a component for fire protection service. These cases did not address water rates for water usage at all; they were about one-time connection charges based on a new customer's "equitable share" of construction costs for the water system. None of the cases analyzed or even addressed the governmental/proprietary dichotomy at issue in the present case.

The Fire Commissioners' reference to *Teter v. Clark County*, 104 Wn.2d 227, 704 P.2d 1171 (1985) (Amicus Br. at 11), also does not support their position. The Court's decision in *Teter* upheld the validity of the county's imposition of storm water fees on property owners, where the fees were rationally based on the relative burdens placed on the county's storm water collection and drainage facilities by the properties in question. Here, there is no relationship (except possibly an inverse one) between the amount of water used by a utility customer and the burden the customer

places on the public fire protection system. Furthermore, the fire protection system is for the benefit of the entire general public, not just water users, and the amount of benefit received is unrelated to the amount of water used.

C. Introducing the Concept of Commodity Charges Does Nothing to Support the Fire Commissioners' Position.

The Fire Commissioners' third argument is that the concept of a "commodity charge" should be added to the analysis traditionally used by this Court in categorizing various types of governmental charges as either fees or taxes. (Amicus Br. at 12-17; *see also Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995)). But adding the notion of a "commodity charge" would not contribute anything of value to the analysis, nor would it lend any support to the Fire Commissioners' position that utility ratepayers should be charged for fire hydrant costs.

While it may make sense to view water used by a utility customer as a "commodity" that is sold by the utility to the customer, and to view the amounts paid by the customer for that water through rates as a "commodity charge," it is absurd semantic wordplay to refer to the "availability" of fire hydrants as a "commodity" sold by the utility to the customer. Fire hydrant "availability" can no more be considered a "commodity" than police protection "availability," or park "availability,"

or street "availability" could be considered a commodity. Using the word "commodity" to describe the availability of general governmental services is to stretch the term beyond any rational meaning.

Indeed, the Spitzer article cited by the Fire Commissioners explains the concept of a "commodity charge" as follows:

> Commodity charges are fees for products or services provided by governments to consumers in a fashion similar to the way private sector businesses provide products or services. Economists often characterize these products and services as private goods because they are used by individual consumers rather than the public collectively. Classic examples of governmentally provided commodities are water and electricity. They are often provided by utilities, self-contained government companies focused on the specific product or service. Commodities may also include special services not available to the public at large.

Hugh D. Spitzer, *Taxes v. Fees: A Curious Confusion*, 38 Gonz. L. Rev. 335, 343-44 (2002-03) (emphasis added). No part of that definition would apply to "fire hydrant availability" as suggested by the Fire Commissioners.

The very reason why it seems natural to apply the word "commodity" to the water or electricity used by a utility customer is because the individual customer is charged in accordance with the amount of the service the customer uses. The reason why it is nonsensical to apply the word "commodity" to the "availability" of governmental functions serving the general public is because there is no rational way to measure or

charge for the amount of benefit received by individual users of general governmental services such as police protection, public streets and public fire protection – including fire hydrants. Certainly there is no correlation between the amount of water used by a homeowner and the amount of benefit he or she receives by virtue of having a policeman, fireman, or fire hydrant available if the need for one ever arises.

D. There Is Nothing Unreasonable About Charging a Governmental Entity Responsible for Fire Protection for Fire Hydrant Costs.

The Fire Commissioners' fourth and final argument is that it would be "absurd" or "unreasonable" to charge fire districts for fire hydrant costs. As noted above, neither the ratepayers nor any of the other remaining parties actively involved in this appeal are affirmatively asking the Court to impose fire hydrant costs on the fire districts rather than the cities. However, we feel compelled to point out that it would be neither absurd nor unreasonable to charge the governmental entity responsible for fire protection in a given jurisdiction for the costs of fire hydrants serving that jurisdiction.

In the ratepayers' view, there are good reasons to deem the general government (city or county, as the case may be) as the governmental entity chiefly responsible for fire protection within its jurisdiction (as the trial court found). On the other hand, there are also good reasons to consider a

fire district as the governmental entity chiefly responsible for fire protection in a jurisdiction served by such a district. If fire hydrants are provided in an area, presumably they will be used for fire protection in that area. It would be perfectly reasonable (if not mandatory under the Local Government Accounting Statute, RCW 43.09.210) for the costs of fire hydrants to be paid by the governmental entity that benefits from having the hydrants available to help it fulfill its firefighting function.

III. CONCLUSION

The amicus brief submitted by the Fire Commissioners does not offer anything of value to assist the Court in deciding the issues presented in this case. The instant case is about including fire hydrant costs in amounts charged to utility ratepayers for water usage; it is not about one-time connection fees for hooking up to an existing or expanded water system.

The statutes authorizing or requiring water utilities to provide fire hydrants do not answer the question of who must pay for those costs. To the extent the 2002 amendment purports to authorize including such costs in water rates, it is unconstitutional for exactly the same reason why this Court unanimously held the same amendment unconstitutional insofar as it purported to authorize charging electricity ratepayers for streetlight costs.

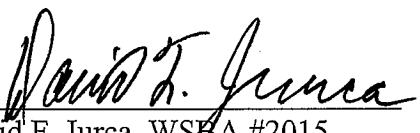
Characterizing water fees as "commodity charges" rather than

"fees" under the traditional *Covell* test adds nothing helpful to the analysis of the issues presented in this case, since "fire hydrant availability" is no more a "commodity" than "police availability" or the "availability" of any other general governmental service.

Finally, there is nothing unreasonable about charging the governmental entity responsible for fire protection for the costs of providing that public service, including the costs of fire hydrants.

Respectfully submitted this 19th day of February, 2008.

HELSELL FETTERMAN LLP

By 

David F. Jurca, WSBA #2015
Jennifer S. Divine, WSBA #22770
Connie K. Haslam, WSBA #18053
Attorneys for Respondents/Cross-Appellants Lane, *et al.* (Ratepayers)